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Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

No. 1479.

HENRY B. SIRE,
Plaintiff in Error,

vs.

ELLITHORPE AIR BRAKE COMPANY,
Defendant in Error.

In Error from the Circuit Court for the Southern District of New York.

BRIEF OF PLAINTIFF IN ERROR.

CHAUNCEY SHAFFER,
ALBERT I. SIRE,
J. HUBLEY ASHTON,
Counsel for Plaintiff in Error,
New York City.

Evening Post Job Print, New York.

IN THE

Supreme Court of the United States.

HENRY B. SIRE,
Plaintiff in Error,

vs.

ELLITHORP AIR BRAKE COMPANY,
Defendant in Error.

UNITED STATES OF AMERICA,
Southern District of New York, ss.:
City and County of New York,

ALBERT I. SIRE, being duly sworn, says: That he was the attorney for the defendant in this action, and who is now styled the plaintiff in error. That the appeal herein was taken in good faith, and for the purpose of rectifying supposed errors committed by the Court below and not for the purpose of delay. That on the 15th day of March, last, deponent obtained for the plaintiff in error an order from Mr. Justice Addison Brown staying proceedings on the part of the plaintiff (defendant in error), for the purpose of enabling the defendant (plaintiff in error) to make, file and serve a case of exceptions. That on the 17th day of March, last, deponent received a notice from the plaintiff's (defendant in error's) attorneys to the effect that they would move before Mr. Justice Addison Brown on the 18th day of March, last, for an order vacating said order made as hereinbefore stated. That pursuant to said notice deponent met Mr. Ashton, plaintiff's attorney, and he (Ashton) moved pursuant to said notice to vacate the order permitting the defendant (plaintiff in error) to make, file and serve a case of exceptions on the ground that the judgment was less than $5,000, and in view of that fact the plaintiff in error had no right to appeal, and submitted points and authorities in support of his (said Ashton's) position. Mr. Justice Brown heard Mr. Ashton in support of said motion, and de opponent in opposition thereto, and said Justice rendered an opinion, holding that the counterclaim in this action was rightfully pleaded, and being wholly rejected and over $5,000, the defendant (plaintiff in error) had a right to appeal on a case of exceptions, and denied the motion to vacate the aforesaid order; thereupon deponent entered an order denying the motion to vacate the aforesaid order, a copy of which deponent caused to be served upon the attorneys for the plaintiff (defendant in error), and received due admission of service thereof on the 21st day of March, 1890.

That no action or appeal was taken from said order made by Mr. Justice Addison Brown as aforesaid. To support the counterclaim as alleged in the defendant's (plaintiff in error's) answer, the defendant (plaintiff in error) gave his testimony, and called as witnesses on his behalf Samuel H. Huxford, William W. Sweet and Charles A. Stein, who corroborated the testimony of the defendant, showing the damage he sustained, which was entirely disallowed.

That on the 5th day of April, 1890, deponent caused a copy of the defendant's proposed bill of exceptions to be served upon the plaintiff's attorneys, in accordance with the practice in vogue in this State, to which plaintiff's attorneys had the right to serve proposed amendments and then have the same settled by the trial Justice; that the case was settled by the trial Justice on April 7, 1890.

That on the 14th day of March, 1890, deponent caused to be served upon the attorneys for the defendant in error a copy of the notice and exceptions, of which the originals were filed with the Clerk of thi~~s~~e Circuit Court on the same day.

That prior to the rendition of the trial Justice's decision all the exhibits in the case were delivered to the Clerk of the Court to be sent to Hartford to said Justice. That after the Justice's decision said exhibits were returned to the Clerk of said Court, and the respective attorneys for the parties each received their respective exhibits.

That by the bill of exceptions as settled, it directs that Exhibit "B" and Exhibit "D" be taken in. That it was the intention of deponent to have Exhibit "C" also taken in in the bill of exceptions, but deponent finds that the same was omitted. That by reason of inadvertence on the part of deponent Exhibits "B" and "D" were not forwarded to the appellate Court with the record, and deponent as soon as he discovered the fact on the 4th day of December, called upon the attorneys for the defendant in error, and requested that Exhibits "B" and "C" be filed with the Clerk of the Court where said action was tried, and deponent would file Exhibit "D" and cause them to be forwarded and made a part of the record.

The attorneys for the defendant in error refused to file said exhibits.

The following language appears in Exhibit "D": "One-half of the contract shall be due and payable when the machinery is in the building, the other half shall be paid when the elevator is up and in complete running order." The following words stricken out of said exhibit: "Should you cause us to delay shipping or erecting the elevator, both payments shall be due on the day named for completion, and any deferred payment shall bear interest at the rate of eight per cent. per annum."

Exhibit "C," the contract which the defendant in error contended for, contains the following language: as near as deponent can state it "One-half of the contract price shall be due and payable when the machine is in the building, and the other half shall be paid when the elevator is up and in complete running order, these moneys to be paid only on our written order as the work progresses. *Should you cause us to delay shipping or erecting the elevator, both payments shall be due on the day named for the completion, and any deferred payment shall bear interest at the rate of eight per cent. per annum.*"

It will therefore be noticed that Exhibit "D" is not the contract set forth in the pleading of the defendant in error, but Exhibit "C" is the contract sought to be recovered on, and the contract found by the Court not to be the contract of the respective parties as having been entered into.

That, as is hereinbefore, stated Exhibits "B" and "D," directed by the bill of exceptions to be taken, are not taken in, and in consequence thereof the record is incomplete. That it is deponent's intention to take steps in order to have Exhibits "B" and "D" made a part of this record, and to have Exhibit "C" included in the bill of exceptions if possible. That owing to deponent's professional engagements in court, and the recent discovery of the omissions, and the defendant in error's refusal to extend the time of the hearing of this motion after being requested by deponent, it has been utterly impossible for deponent to supply the omissions which were necessary to be supplied in order to have a proper determination of the entire matter.

That the record as printed in defendant in error's motion brief is not a complete and full record of this case on appeal, No. 1479, as will appear from inspection of the record upon file in this Court.

The bill of exceptions as printed in the defendant in error's moving papers, commencing on page 19, does not state after the words "Plaintiff's Exhibit 'B' (here take in)," and after the words, "parties entered into (here take in Exhibit 'D')," as appears by the bill of exceptions now filed with the record in the appellate Court.

That if the Court concludes to take up this motion in view of the fact that the record has not been printed, and deponent intends to have the exhibits aforesaid, which are by the bill of exceptions directed to be taken in, and are omitted as aforesaid, then deponent submits the following authorities.

ALBERT I. SIRE.

Sworn to before me this 12th
day of December, 1890.
WALTON C. DUPIGNAC,
Notary Public,
N. Y. Co.

United States of America,
Southern District of New York,
City and County of New York, } ss.:

Chauncey Shaffer, being duly sworn, says: That he acted as one of the counsel during the progress of the trial of the above-entitled action before the Hon. Nathaniel Shipman, Justice. That after due deliberation deponent concurred with Albert I. Sire that an appeal in this action should be taken for the purpose of rectifying supposed errors, and so advised. That this appeal was taken in good faith and not for the purpose of delay.

Chauncey Shaffer.

Sworn to before me this 12th
day of December, 1890. }
Walton C. Dupignac,
Notary Public,
N. Y. Co.

Seal

IN THE

Supreme Court of the United States.

Henry B. Sire,
Plaintiff in Error,

vs.

Ellithorp Air Brake Company,
Defendant in Error.

BRIEF IN OPPOSITION TO MOTION.

The record in this case has not been printed, and we do not agree with the defendant in error as to the facts, therefore the plaintiff in error objects to the Court taking up and deciding this motion until the printed records are before the Court.

Statement.

This case was tried before the Hon. Nathaniel Shipman one of the Justices of the Circuit Court of the United States for the Southern District of New York, the jury having been waived by written stipulation in accordance with the statute in such case made and provided, and resulted in a judgment in favor of the defendant in error for the sum of

$2,873.65, on the 7th day of April, 1890, from which this appeal has been taken. The following is a copy of the complaint and answer:

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ELLITHORP AIR BRAKE COMPANY
AGAINST
HENRY B. SIRE

Complaint.

The "Ellithorp Air Brake Company," a foreign corporation, duly created, organized and acting under and by virtue of the laws of the State of Illinois, and located in said State, plaintiff in this suit by Ashton & Fromme, its attorneys, complains of Henry B. Sire, a citizen of the United States and the State of New York, and an inhabitant residing and found within the Southern District of New York, defendant herein duly summoned, &c.

FIRST.—That the said plaintiff as such corporation is engaged in the business of constructing, building, manufacturing, placing and setting up hydraulic and steam passenger and freight elevators, patent air cushions and brakes, with all the appurtenances and appliances belonging and connected therewith, for hotels, offices, residences, apartment buildings, warehouses and other structures throughout the United States and elsewhere, with its factory and general office located in the City of Chicago and State of Illinois.

SECOND—That, heretofore, to wit, on the first day of October, A. D. 1888, at the City and County of New York, in the district aforesaid, the said plaintiff at the special instance and request of the said defendant, made and entered into a certain contract or agreement, in writing, with the said defendant to furnish and erect for the said defendant, in a good, substantial and workmanlike manner, two hydraulic passenger elevators in the apartment or flat buildings on Fifty-ninth street, opposite Central Park (and known as the East and West Flats), and two safety steam passenger elevators, one in the residence building on Fifty ninth street and one in the office building, corner of Centre and Read streets, all in the City, County and State of New York, and the district aforesaid, making in all four (4) elevators, with the appurtenances and appliances as specified and agreed upon, ready for use, in eighty to ninety days from date of receipt of approved plans, which plans the said plaintiff avers were duly approved by the said defendant on the day and year aforesaid, at the place aforesaid, for the sum of six thousand seven hundred and fifty ($6,750) dollars, one half thereof to be due and payable when the machines were in the buildings, and the other half thereof to be paid when the said elevators were up and in complete running order, with a provision therein contained that should the said defendant cause delay to the said plaintiff in the shipping or erecting the said elevators then both of said payments should be due and payable on the date named for completion, and that any deferred payment should bear interest, all of which remains due and unpaid, except as hereinafter stated.

THIRD.—That thereafter the said plaintiff, in pursuance of and in accordance with the terms, provisions and conditions of said contract or agreement, in writing, and the approved plans as aforesaid, caused the said elevators to be built and constructed with all the appliances and appurtenances ready for shipment within the time specified, to be erected and set up in complete running order in said buildings in accordance with and pursuant to, the terms and conditions of said contract or agreement, and approved plans and time as aforesaid: That thereafter the said two hydraulic elevators were duly shipped, and on or about the 3d day of January, A. D. 1889, and within the time specified, the said machinery was duly placed in the said apartment or flat building on Fifty-ninth street, as aforesaid, and as provided in said contract or agreement, and one of them duly set up and put in complete running order, as provided in and by the terms of said contract or agreement (that is to say, in the part known as the West Flat), and the other one (that is to say, in the part known as the East Flat), very nearly set up and finished in complete running order, as provided in said contract or agreement, when the said plaintiff and its workmen were stopped and prohibited by the said defendant from further proceeding with the said work and the erection thereof, and denied access to the said buildings for the further prosecution of said work, although the said plaintiff was then and there ready and willing, and then and there offered to finish and put the same in complete running order, as specified in said contract or agreement and the approved plans and time as aforesaid, all of which the said defendant had due notice, to wit, at the place aforesaid.

Fourth.—That after the said two safety steam elevators with the appurtenances and appliances as specified in said contract or agreement, were ready for shipment, as aforesaid, and about to be shipped for setting up in complete running order in the said aforesaid residence and office buildings as specified in said contract or agreement, the said defendant notified, requested and directed the said plaintiff not to ship the same as he was not ready for them, and desired to make some changes, and that the said plaintiff should hold them in store until further orders from said defendant, all of which the said plaintiff caused to be done and where the same remain subject to the order of the said defendant. That the said defendant wholly neglects and refuses to accept or receive the same or to allow or permit the said plaintiff to ship or erect and set up the same in complete running order in the said aforesaid buildings within the time or otherwise, as specified in the said contract or agreement and in accordance with the approved plans as aforesaid, although the said plaintiff was and has at all times been ready and willing and has offered so to do, all of which the said defendant had due notice, to wit, at the place aforesaid.

FIFTH.—That the said plaintiff has at all times since the making and entering into said contract or agreement, and the approval of said plans and within the time as aforesaid, been ready and willing and has repeatedly offered to the said defendant to fully perform, carry out, fulfill and complete the said contract or agreement, and all of the terms and conditions thereof on its part, and to furnish and erect all of the said elevators with the appurtenances and appliances according to said approved plans in complete running order in and for all of the said buildings as therein specified, all of which the said defendant had due notice. Yet the said defendant not regarding the said contract or agreement and his duty in that behalf, and well knowing the premises as aforesaid, wholly neglects, fails and refuses to allow or permit the said plaintiff so to do, or to have access to the said buildings for that purpose as aforesaid, or to receive the same or any part thereof according to the tenor and effect of the said contract or agreement as aforesaid, to the great loss, injury and damage of the said plaintiff in the premises.

SIXTH.—That the said plaintiff has at all times, since the making and entering into the said contract or agreement and the approval of said plans and within the time as aforesaid, been ready and willing and has offered to perform all of the terms, provisions and conditions thereof; yet, the said defendant, well knowing the premises, has at all times neglected, failed and refused to allow or permit the said plaintiff so to do or to receive the said elevators with the appurtenances and appliances, or to allow them to be erected and set up in complete running order except as hereinbefore stated, or to make the payments therefor as provided in said contract or agreement on his part or any part thereof, except the sum of nineteen hundred ($1,900) dollars, on account thereof, although often requested and ordered by the said plaintiff so to do, and still doth neglect and refuse to perform and comply with the said contract or agreement on his part, or to make the payments as therein provided or any part thereof, except as aforesaid.

Whereby and by means and reason whereof, and by means and reason of the neglect, failure and refusal of the said defendant as aforesaid, the said several elevators with the appurtenances and the appliances and the amount agreed upon to be paid therefor by the said defendant, except as aforesaid, have become wholly lost to the said plaintiff, and the said plaintiff in consequence and by reason thereof, and in consequence of the neglect, failure and refusal, and the acts and doings of the said defendant in that behalf as aforesaid, has sustained loss and damage on account thereof to the amount of six thousand seven hundred and fifty ($6,750) dollars, and the interest thereon, no part of which has been paid except the sum of nineteen hundred dollars as aforesaid, all of which the said defendant has due notice, to wit, at the place aforesaid.

SEVENTH.—That in consequence of the said neglect, failure, refusal and acts and doings of the said defendant in the premises as aforesaid, and by means and reason thereof, the said plaintiff has sustained additional loss and injury by way of special damage in addition to the amount aforesaid, in this to wit, they have produced and are now producing great pecuniary loss and injury to the property, estate, business and income of the said plaintiff, and the said plaintiff has been required to do what it otherwise would not have done and was not required to do by the terms and conditions of said contract or agreement, that is, it has been compelled and required to employ extra workmen, labor, tools and materials, and to do and perform extra work and labor in and about the cleaning out and removing rubbish, brick, mortar and filth from portions of said buildings, and by reason and on account of delays in not having said buildings and the hatchways thereof, ready for the receiving erecting and setting up the said elevators with the appurtenances and appliances in complete running order, loss of time of workmen and to incur, pay, lay out and expend large sums of money therefor, and for insurance, freights and storage, and for conducting telegraphic and other correspondence with agents, servants and the said defendant, and by reason and on account of obstructions, interruptions and hindrances on the part of the said defendant and workmen and mechanics employed by him and engaged in and about said buildings, and the wages and expenses of unemployed labor and material, loss of tools, and for extra expense incurred in and about the management, alterations, freight, insurance and storage of the said elevators, appurtenances and appliances and in preparing and putting in proper condition the hatchways of said buildings to receive the same, amounting to a large sum of money, to wit, the sum of two thousand five hundred ($2,500) dollars; to the damage of the said plaintiff, its property and business amounting in the whole to the sum of seven thousand ($7,000) dollars, no part of which has been paid.

Wherefore, the said plaintiff demands judgment herein against the said defendant for the said sum of seven thousand ($7,000) dollars, with interest thereon from the date of the commencement of this suit and for costs.

ELLITHORP AIR BRAKE COMPANY,
By ASHTON & FROMME,
Plaintiff's Attorneys.

Office and P. O. address,
132 Nassau Street,
New York City.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, } ss.:

ALBERT J. DOTY, being duly sworn, doth depose and say: I am the agent and superintendent of the plaintiff named in the foregoing complaint, and have read the said complaint, and know the contents thereof; that the same is true to my own knowledge, except as to matters and things therein stated and alleged therein upon information and belief, and as to those matters, I believe it to be true. Deponent further says that the reason this verification is not made by the plaintiff is that said plaintiff is a corporation and that all the matters and things set forth in said complaint are within the personal knowledge of deponent, who has the contract, the correspondence and all papers relating to said contract, in his possession.

ALBERT J. DOTY.

Sworn to before me this }
7th day of May, 1889. }

J. P. BERG, [L. S.]
Notary Public,
N. Y. Co.

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ELLITHORP BRAKE COMPANY
AGAINST
HENRY B. SIRE.

The defendant Henry B. Sire appearing in this action by Jacob Fromme, his attorney, and answering the complaint:

FIRST.—Denies each and every allegation therein contained, except as hereinafter admitted or alleged.

SECOND.—Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph.

THIRD.—Denies the allegations contained in the 2d, 3d, 4th, 5th, 6th and 7th paragraphs, except that he admits that he has paid the sum of $1,900, and that this case is made difficult by the complete antagonism of the witnesses for the respective parties, in regard to almost every important fact in the case. This diversity commences with the terms of the written contract; the respective copies which are produced by the parties are unlike. Quite an important part of the terms of payment contained in the printed proposals of the plaintiff is erased in the defendant's copy, and upon the question whether this erasure was made by consent, the parties are at variance."

"*The weight of the testimony leads to the conclusion that the contract which has been heretofore stated, and which is known in the case as Exhibit 'D' was the one which was made.*"

Exhibit "D" is not the contract or agreement that the plaintiff (defendant in error) set forth in the complaint, as to the manner in which the work should be done, the time within which it should be completed, nor how the payment should be made, but it is in direct conflict with said contract received in evidence marked Exhibit "D" (and directed by the bill of exceptions to be taken in). The Court will notice that the allegations to the effect "that should the plaintiff in error cause us delay in shipping or making the elevators, both payments should be due on the days named for the completion of the work" are stricken out and erased from Exhibit "D," the contract found by the Court to be the one entered into between the parties. Therefore the issues presented by the pleadings and the contract marked Exhibit "D" found by the Court to be the contract of the parties, and this being a common law action, and not an equity action, the Court had no right and no power under the issues presented to determine it as if it were a suit in equity.

The Court even went so far as to find that there was $2,485, due the defendant in error, with interest from March 14, 1889, as a part of the damages, when the complaint only demands interest from the commencement of the suit; to wit, the 27th day of May, 1889.

The ungentlemanly statement of Mr. Ashton, attorney for the defendant in error, found on page 31 of his points relative to defendant's exceptions as to the "stupidity or intentional imposition upon the court" is on a par with his motive and manner throughout the entire proceeding. As to the exceptions filed and made a part of this return, the same were filed on the 14th day of March, 1890, within ten days after the rendition of the decision and in accordance with the rules of practice of the courts of this State, and as prescribed by section 994 of the Code of Civil Procedure.

BRIEF of the plaintiff in error in opposition to motion to dismiss writ of error, with interest, costs and damages; or for the affirmance of the Court below with such costs, interest and damages, makes the following points:

POINTS.

First.—There can be no question but that the plaintiff in error has the legal right to appeal, the amount involved being for more than $5,000. The complaint demands judgment for $7,000. Judgment was entered for the plaintiff in the sum of $2,973.65.

The answer set up a counterclaim in accordance with the practice prescribed by the courts for the State of New York, and in the manner prescribed by the statute. (See Sections 500 and 501 of the Code of Civil Procedure.)

The counterclaim of the defendant was entirely disallowed. A motion was made, as appears by the affidavit made by Mr. Albert I. Sire on the 12th day of December, 1890, to dismiss the appeal on the ground that the judgment recovered was less than $5,000, and the motion was heard by Mr. Justice Addison Brown, and by him determined (no appeal having been taken therefrom) that the defendant has the right to appeal, as appears by his decision, and the order made thereon, and no appeal was taken from said order holding that the defendant has the right to appeal. The defendant in error now seeks to renew the motion in this Court, it having been denied in the Court below, the motion having been once heard and determined that the defendant's counterclaim entitles him to appeal, and no appeal having been taken from such determination, the plaintiff is bound by the decision heretofore made.

The following authorities are cited in support of the plaintiff in error's position that the amount involved is more than $5,000, and that the plaintiff in error's right to appeal is unquestionable:

As to what is meant by matter in dispute, Mr. Justice Field, in the case of Lee *vs*, Watson, 1 Wallace, 337, says: "By matters in dispute, is meant the subject of litigation, the matter for which the suit is brought and upon which the issue is joined, and in relation to which juries are called and witnesses are examined."

As appears by the bill of exceptions presented: "To support this counterclaim, as alleged, defendant gave his testimony and called as witnesses Samuel H. Huxford, William W. Sweet and Charles A. Stein."

The doctrine in Lee *vs.* Watson, was affirmed and applied to the case of Shacks *vs.* Hartford Fire Ins. Co., 93 U. S., 241. The following is the opinion of Mr. Justice Davis in the case of Ryan *vs.* Bindley:

"The allegation in the declaration must be taken generally as fixing the amount or value for the purpose of jurisdiction, but the subsequent pleadings may so change the original character of the suit, or to involve an amount or value in excess of $2,000, and when this is done the judgment and the decrees of the Court below are subject to be reviewed here. In this case you interposed a notice of set off and insisted that Bindley owed him $4,000 for goods sold and money lent, which he claimed the right to set off against Bindley's demand, and to recover against Bindley a judgment for the excess. By the laws of Ohio such a defense is permitted, and if the defendant succeeds in proving his set off, and it is larger than the plaintiff's claim, he is entitled for a judgment for the excess. The parties are concluded by the judgment and cannot again litigate the same subject matter unless the judgment should be reversed on appeal or writ of error to the Supreme Court. This law of counterclaim and the practice under it has been adopted as a rule of court by the Circuit Court of the United States for the District of Ohio. The plea in this case was therefore proper, and after it was interposed the matter in dispute rightfully exceeded the sum of $2,000, exclusive of costs, and as the plaintiff had judgment, it is plain that the defendant had the right to sue out his writ of error. * * * The rules of evidence prescribed by the laws of a State are rules of decisions for the United States Courts while sitting within the limits of such State under the 34th section of the Judiciary Act."

Facts: Suit was brought for $1,000; verdict found $575.85 for plaintiff (Ryan *vs.* Bindley, 1 Wallace Repts., 66).

The claim of over $5,000 disallowed to the appellant by the Circuit Court, which is brought up by appeal, is sufficient to give the Court jurisdiction to the Supreme Court of the United States (Richardson *vs.* Green, 130 U. S., 104).

To give this Court jurisdiction in cases dependent upon the amount in controversy, the matter in dispute must be money, or some right, the value of which can be calculated and ascertained in money (First National Bank of Youngstown *vs.* Hughes, 106 U. S., 523).

This Court has jurisdiction of a writ of error or appeal by a defendant, when the recovery against him is as much in amount or value as is required to bring a case here, and when having pleaded a set-off or counter-claim for enough to give this Court jurisdiction, he is defeated upon his plea wholly, or recovers only an amount which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed (Hilton *v.* Dickinson, 108 U. S., 105; Bradstreet Co. *v.* Higgins, 112 U. S., 227).

The Bill of Exceptions is sufficient.

Revised Statutes of the United States, Sec. 721: "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials of common law, in the Courts of the United States, in cases where they they apply."

Section 914: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary, notwithstanding."

The defendant filed exceptions to the Court's findings on the 17th day of March, 1890, within ten days after rendering the decision and in accordance with the practice and statute of the State of New York. Section 994 of the Code of Civil Procedure.

In a case tried by the Court, a finding of fact without evidence to support it, if accepted to, presents a question of law subject to review in this Court.

Sickles *v.* Flanagan, 79 N. Y., 224.
Section 993 of Code of Civil Procedure.

(*a.*) A party permitting the completion of the performance of a contract after the time for the performance has expired, does not thereby forfeit his right to damages for the breach of the contract as to time. The measure of damages for the breach by a contractor of a stipulation in a building contract as to the time of performance, where he has been allowed subsequently to go on and complete the contract, is the value of the use of the building, while the owner is deprived of the use thereof in consequence of the contractor's delay.

Ruff *et al.* *vs.* Rinaldo, 55 N. Y. Ct. Ap., 664.

It is stated in the opinion of the trial justice that the defendant (plaintiff in error) lost rent upon some of the apartments. That the plaintiff (defendant in error) was ready to perform its part of the contract except in the manner and time, and yet disallowed any part of the counterclaim.

(*b.*) The performance of the work of the contract is precedent to any payment, and the contractor failing in part cannot recover for the other part for the benefit thereof received by the employer.

Cunningham *vs.* Jones, 20 N. Y., 486.
Tipton *vs.* Feitner, 20 N. Y., 423.

Second.—Error can be assigned in this Court on an exception to the exclusion of oral proof of facts, although the record does not show any witness was actually called to the stand to give the evidence, or that any one was present who could have been called for the purpose if the Court had decided in favor of admitting it.

Scotland Co. *vs.* Hill, 112 U. S., 183.

When error alleged does not appear on the face of the record or the demurrer, a bill of exceptions is the only mode of bringing a case before this Court for review.

Graham *vs.* Bayne, 18 Howard, 60.

Upon examination of the complaint, answer, findings and decision it will be seen that the trial justice committed error, and in such a case *no* bill of exceptions is necessary where the error alleged is apparent upon the record.

Young *vs.* Martin, 8 Wallace, 354.

This Court will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests.

St. Louis Nat. Bank *vs.* Ins. Co., 100 U. S., 43.

Under the rule allowing a motion to affirm to be united with a motion to dismiss the motion to affirm, cannot be entertained unless there appears on the record at least some color of right to a dismissal. Motions to dismiss a writ of error and to affirm a decision below, denied, where the records have not been printed, and the assignment of errors in the brief for the defendants, presents questions of which this Court has jurisdiction.

Crane Iron Co. *vs.* Hoagland, 108 U. S., 5.

This Court cannot dismiss a case on motion simply on the ground that it has been brought here for delay only.

Armory *vs.* Armory, 91 U. S., 356.

A writ of error will not be dismissed for want of jurisdiction by reason of failure to annex thereto or return therewith an assignment of errors.

Gumbel *vs.* Pitkin, 113 U. S., 545.

Questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, or by the Court after due waiver in writing of a jury trial.

Andes *vs.* Slauson, 130 U. S., 435.

Although a bill of exceptions is imperfectly drawn, yet if this Court can, by way of inference, ascertain the substance of the facts, it may, in order to save delay, proceed to decide the case instead of sending it back for a fuller and more technical bill.

United States *vs.* Morgan, 11 How., 154.

Upon a motion to dismiss before printing the record, the motion papers must so present the case as to make a reference to the transcript unnecessary.

City of Waterville *vs.* Van Slyke, 115 U. S., 290.

Under the rule allowing a motion to affirm to be united with a motion to dismiss, the motion to affirm cannot be entertained unless there appears on the record at least some color of right to a dismissal.

Richards *vs.* Mackall, 113 U. S., 539.
Whitney *vs.* Cook, 99 U. S., 607.

Motions to dismiss a writ of error and to affirm a decision below denied, where the records have not been printed, and the assignment of errors in the brief for the defendants present questions of which this Court has jurisdiction.

Crane Iron Co. *vs.* Hoagland, 108 U. S., 5.

On motion to dismiss merely, the merits of a case cannot be considered.

Bohanan *vs.* Nebraska, 118 U. S., 231.

Where the question of jurisdiction cannot be determined without looking into the merits, the motion to dismiss for want of jurisdiction will be denied, with permission to argue it upon the hearing.

Lynch *vs.* De Bernal, 19 U. S., 395.
Hecker *vs.* Fowler, 1 Black, 95.
Semple *vs.* Hagar, 4 Wall., 431.

This Court can notice a material defect in the pleadings and verdict, as they are represented in the record to have existed in the Court below, although such defect is not noticed in the bill of exceptions nor suggested by the counsel in argument here.

Garland *vs.* Davis, 4 How., 131.

Third.—ASSIGNMENT OF ERRORS which appear on the face of the Record.

It appears on the face of the record that the Court below erred in rendering judgment in favor of the defendant in error.

FIRST.—The complaint declares in contract, and avers strict performance; the answer denies the contract and the performance. It appears by the decision of the Court that on the trial the defendant in error did not prove the contract alleged, nor did it prove or substantiate that it performed the contract, but on the contrary it appears that the plaintiff wholly failed to perform the contract.

SECOND.—The counterclaim was entirely disallowed.

THIRD.—The Court did not give judgment according to the allegations of the parties, but on a cause of action not set up in the complaint, or contended for by any of the parties.

FOURTH.—No amendment of the complaint was made.

POINTS ON ASSIGNMENT OF ERRORS WHICH APPEAR ON THE FACE OF THE RECORD.

" It is a fundamental rule that judgment shall be *secundum allegata et probata;* any departure from that rule is certain to produce surprise, confusion and injustice."

Day *vs.* Town of New Lots, 107 N. Y., (148), 154.
Romeyn *vs.* Sickles, 108 *Id.*, (650), 652.

" Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary."

Southrick *vs.* First National Bank, 61 Howard's Pr. R., (164), 170.

The only manner in which the Court could come to the conclusion that it did, was to entirely disregard the pleadings and the distinct issue that was raised by the parties, and he had to go outside of the record to justify any judgment against the plaintiff in error, and in his decision he fully shows this, for he says: "Neither party complied with the contract. The plaintiff did not complete the elevators in the apartment house within the specified time. This non-compliance was fully waived by the defendant. The defendant had in fact accepted plans for the cars. He did not decline to accept them when they were submitted, and he permitted the car to be put into the elevator, the work passing almost daily under his observation. He could not, therefore, require a corner post car in the East Flat elevator without compensation, and could not compel the plaintiff to stop work unless it provided such new car. The refusal of the defendant to permit the completion of the East Flat elevator by the erection of a side post car, was a breach of the contract, and there was no willful abandonment of the work on the part of the plaintiff."

Even by the loose and elastic pleadings allowed by the Code of Civil Procedure of the State of New York, the Court under the decisions above cited was bound to have found a judgment in favor of the plaintiff in error, instead of a judgment for the defendant in error, and to have allowed the plaintiff in error the amount of his counterclaim for damages sustained by reason of the neglect and omissions of the defendant in error.

Fourth.—It is respectfully submitted that the motion of the defendant in error be denied, with costs.

CHAUNCEY SHAFFER,
ALBERT I. SIRE,
J. HUBLEY ASHTON, of Counsel,
For Plaintiff in Error.

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FILED.
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CLERK.

No. 1479.

In the Supreme Court of the United States.

HENRY B. SIRE,
Plaintiff in Error,

vs.

ELLITHORPE AIR BRAKE COMPANY,
Defendant in Error.

In Error to the Circuit Court for the Southern District of New York.

Motion, Record and Brief for Defendant in Error.

SAM'L ASHTON,
Counsel for Defendant in Error,
132 Nassau St., New York City.

SAMUEL J. BROWN, Book and Job Printer, 21 College Place, New York.

No. 1479.

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In the Supreme Court of the United States.

No. 1479.

HENRY B. SIRE,
Plaintiff in Error,
vs.
ELLITHORPE AIR BRAKE COMPANY,
Defendant in Error.

October Term,
A. D. 1890.

In error to the Circuit Court of the United States for the Southern District of New York.

SIR:

Please take notice that upon all the motion papers, brief for defendant in error, transcript of the record, or so much and such parts thereof, and all the proceedings presented thereby, as are necessary and material for a proper presentation of the motion for a dismissal of the writ of error, or an affirmance of the judgment of the Court below with interest, cost and damages, and for such other or further order or relief as to the Court shall seem just, duly filed in the above-entitled cause, copies of all of which are annexed and herewith duly served upon you.

I shall, on Monday, the 15th day of December, A. D. 1890, at the Capitol, in the City of Washington, D. C., upon the coming in of the Court on that day, or as soon thereafter as counsel can be heard, bring on said motion for hearing and final disposition, when and where you can be present and be heard for plaintiff in error, if you so desire.

Dated November 15th A. D. 1890.

Yours, &c.,

SAM'L. ASHTON.
Counsel for Defendant in Error,
132 Nassau Street,
New York City.

To Chauncey Shaffer, Esq.,
Counsel for plaintiff in Error,
99 Nassau Street,
New York City.

I hereby admit due personal service of copies of the within and annexed motion, abstract of the record, brief and papers, and notice upon me made this day of November, A. D. 1890.

CHAUNCEY SHAFFER,
Counsel for Plaintiff in Error,
99 Nassau St.,
N. Y. City.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1479.

HENRY B. SIRE, Plaintiff in Error, AGAINST ELLITHORPE AIR BRAKE COMPANY, Defendant in Error.	**October Term A. D. 1890.**

In error to the Circuit Court of the United States for the Southern District of New York.

And now comes the said defendant in error, by Samuel Ashton, its counsel, and moves the Court to dismiss the writ of error sued out in the above-entitled cause, with interest, cost and ten per cent. damages.

Or that the judgment of the Court below be affirmed with interest, cost and ten per cent. damages, as by the statute and rules of the Court in such cases made and provided, and for such other or further order or relief as to the Court shall seem just, for the following reasons, to wit:

1st. Because the above-entitled Court has no jurisdiction of said cause, as appears by the transcript of the record and bill of exceptions presented and filed in said cause.

2d. That if the Court has jurisdiction upon the face of the record, it is manifest that it is frivolous and for delay only.

3d. That it is manifest from the transcript of the record and bill of exceptions presented and filed in said cause that the writ of error was sued out and is prosecuted for mere delay only.

4th. That there is no proper, necessary, sufficient and required bill of exceptions attached to and set forth in the transcript of the record presented and filed in said cause.

5th. That the transcript of the record and bill of exceptions presented and filed in said cause wholly fails to present and set forth so much and such parts of the evidence and exhibits presented and given in evidence upon the trial in the Court below as were material to the issues in said cause.

6th. That the several exceptions taken upon the trial in the Court below, as appears by the bill of exceptions presented in the transcript of the record filed in said cause are frivolous, informal, insufficient, untenable, and wholly fails to present any error of law for review.

7th. That the assignment of errors presented by the transcript of the record fails to designate, or set forth and specify any error of law to be reviewed, as by the statute and rules of Court in such case made and provided.

8th. That there is no proper, sufficient, and required bill of exceptions presented by the transcript of the record filed in said cause, in accordance with the practice and rules of Court.

9th. That it is manifest upon the face of the transcript of the record and bill of exceptions filed in said cause, that the writ of error was sued out for delay only, and is not prosecuted in good faith.

10th. Because, the transcript of the record, assignment of errors, and bill of exceptions presented and filed in said cause, are defective, informal, insufficient and frivolous, and wholly fails to comply with the rules of Court, or to confer jurisdiction, or present any error of law for the Court to review or pass upon.

11th. That the transcript of the record, bill of exceptions and assignment of errors presented and filed in said cause, are otherwise defective, informal, and insufficient, and presents no error of law for review.

Dated November 15th, A. D., 1890.

SAM'L. ASHTON,
Counsel for Defendant in Error,
132 Nassau Street,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1479.

Henry B. Sire,
Pltff. in Error,
vs.
Ellithorpe Air Brake Company,
Deft. in Error.

In Error—October Term, A. D. 1890.

United States of America,
Southern District of New York,
City and County of New York, ss.:

Herman Fromme, of the City, County, and District aforesaid, being duly sworn, doth depose and say that he was one of the attorneys of record in the above-entitled cause, upon the trial thereof, in the Court below, that he has carefully gone over and examined the oral testimony presented and heard upon the trial, and the exhibits presented and heard in connection therewith, and knows that the number of witnesses who were examined and testified upon the trial of said cause for the respective parties was over twenty-four, and that the oral testimony consists of over nine hundred and thirty-five pages of type-written matter, making over twenty-two hundred folios, and that there were at least twenty written and printed exhibits, presented and read in evidence upon the said trial, exclusive of five copies of plans and drawings, making in all over twenty-five exhibits presented and put in evidence by the respective parties upon said trial in the Court below, all of which were material to the issues upon said trial.

(Sd) HERMAN FROMME.

Subscribed and sworn to before me }
this 30th day of October, A. D., 1890. }

(Sd) John A. Shields,
U. S. Commissioner for the Southern District of New York.

Record.

Transcript of the record on file, or so much and such parts thereof as are necessary and material to a proper presentation of the aforesaid motion (No question being raised or presented upon the pleadings, as appears from the transcript of the record, bill of exceptions and assignment of errors), as follows, to wit:

(See Bill of Exceptions—Assignment of Errors, record, pages 39–43).

First.—Writ of Error, allowed and sued out April 7th, A. D. 1890, in the words and figures following, to wit—(record, page 1), upon the back of which is to be found the Clerk's general certificate or return to the transcript of record:

UNITED STATES OF AMERICA, } ss:
The President of the United States of America. }

To the Judges of the Circuit Court of the United States, for the Southern District of New York,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The Ellithorpe Air Brake Company, defendant in error, and Henry B. Sire, plaintiff in error, a manifest error hath happened, to the great damage of the said Henry B. Sire, plaintiff in error, as is said and appears by his complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this seventh day of
[L.S.] April, in the year of our Lord one thousand eight hundred and ninety, and of

the Independence of the United States the one hundred and fourteenth.

John A. Shields,

Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

N. Shipman,
Judge.

Second.—Stipulation waiving jury and submitting case to Judge for trial, filed January 27th, A. D. 1890, in the words and figures following, to wit (Record, page 24):

U. S CIRCUIT COURT.

Ellithorpe Air Brake Company
against
Henry B. Sire.

We hereby waive the trial of this action by a jury and consent that the same be tried by the Court without a jury.

Dated January 27th, 1890.

Ashton & Fromme,
Plt'ff's Att'ys.
Albert I. Sire.
Att'y for Deft.

(Endorsed.)

Ellithorpe Air Brake Company *v.* Sire—Stipulation waiving Jury, U. S. Circuit Court, filed January 27th, 1890.

(Signed) John A. Shields,
Clerk.

THIRD.—**Findings and decision of the trial Judge: original filed March 6th, A. D. 1890, in the words and figures following, to wit: (Record, page 25).**

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ELLITHORPE AIR BRAKE COMPANY
vs.
HENRY B. SIRE.

SHIPMAN, J.:

This is an action at law which was tried by the Court, a trial by jury having been waived by written stipulation signed by the parties.

Upon said trial the following facts were found to have been proved and to be true:

The plaintiff is, and was at the commencement of this suit, a corporation duly incorporated under and by virtue of the laws of the State of Illinois, and located in and an inhabitant of Chicago, in said State, where it has and continuously has had its principal place of business. The defendant is, and was at the commencement of this suit, a citizen of the State of New York, and a resident and an inhabitant of New York City, in the Southern District of said State. The plaintiff is a manufacturer of elevators.

On or about October 1st, 1888, the plaintiff and defendant entered into a written contract, whereby the plaintiff agreed to furnish and erect for the defendant in a good, substantial and workmanlike manner, two Hydraulic Passenger Elevators in his double apartment or flat buildings on 59th street, opposite Central Park (and known as the east and west flats), and two Safety Steam Passenger Elevators, one in the adjoining residence building on 59th street, and one in the office building, corner of Centre and Reade streets, all in the City of New York, making in all four (4) elevators, with the appurtenances and appliances as specified and agreed upon, ready for use in eighty to ninety days from date of receipt of approved plans, for the sum of six thousand seven hundred and fifty ($6,750.00) dollars, one-half thereof to be due and payable when the machines were in the buildings, and the other half thereof to be paid when the said elevators were up and in complete running order, payments to be made upon the written order of the plaintiff, provided the defendant should be satisfied with the amount, as the work progressed.

The plaintiff, in its complaint, avers that it complied with the terms and conditions on its part to be performed, and erected and completed in running order the elevator in the west flat, and very nearly completed the erection of the elevator in the east flat, when the prosecution of the work was stopped and prohibited by the defendant; that the steam elevators were ready for shipment, but the defendant requested that they should not be shipped from Chicago, but should remain there in store until he should decide upon some proposed changes, all of which was done, and that they remained subject to his order; that he has never ordered the same to be shipped, although the plaintiff has been ready to do so, and to comply with the contract. The complaint also alleged that it had suffered special damage by reason of obstructions and hinderances by the defendant to the rapid prosecution of said work, and had incurred extra expense for insurance and storage of the property. The sum of $1,900 was paid by the defendant upon the contract.

The defendant alleges, in his answer, that the plaintiff wholly neglected and failed to perform its contract, and also sets up a counterclaim for damages, arising from such neglect.

The finding of facts in this case is made diffcult by the complete antagonism of the witness for the respective parties to each other, in regard to almost every important fact in the case. This diversity commences with the terms of the written contract, the respective copies which are produced by the parties being unlike. Quite an important part of the terms of payment contained in the printed proposals of the plaintiff is erased in defendant's copy, and upon the question whether this erasure was made by consent, or wrongfully, the parties are at variance.

I am convinced of the honesty of each of the witnesses, Goodwin and A. B. Ellithorpe, whose testimony upon this point is not reconcilable. The weight of the testimony leads to the conclusion that the contract, which has been heretofore stated, and which is known in the case as Exhibit D, was the one which was made. Exhibit C was made in the manner and at the time stated by A. B. Ellithorpe.

On October 28, 1888, A. C. Ellithorpe, the plaintiff's general Manager, came to New York with Frank Roche, his foreman, and on the next day saw the defendant and the different buildings in which the elevators were to be placed. Roche did not commence work until December 20, when he began in the apartment house on 59th Street. During a portion, at least, of his time he was at work in the erection of elevators for other people.

The reason which is given by the plaintiff for this delay is that the 59th Street cellars and the hatchways were not ready for the elevators, and that it was practically impossible to commence sooner. There may have been some ground for this assertion on the very first few days of November, but the extent and the duration of this alleged cause are very much exaggerated; the important reason was that the machinery was not completed in Chicago.

This conclusion is based upon the correspondence. On November 28, 1888, the plaintiff wrote the defendant as follows: "We to-day send you design of cars for your passenger elevator for your approval, all cars to be of the same design. Please approve and return same, so that they may be put under way. The hydraulic engines are under way, and will soon be ready to ship."

On November 30, the defendant wrote the plaintiff requesting an interview in regard to the Centre and Reade Street elevator, to which the plaintiff replied on Dec. 3: "Your elevators are being pushed with all possible despatch," and in regard to the Centre Street elevator, that it was waiting the defendant's decision in regard to his option as to the kind of machine which he would take.

At the date of this letter, the machines were manifestly not ready in Chicago. The machinery for the hydraulic elevators reached New York about December 22, 1888. While this delay existed, and its chief cause is to be attributed to the plaintiff, the defendant was not particularly burdened or annoyed by it.

He was not, at that time, apparently anxious for the speedy completion of his houses. The plaintiff prosecuted its work in the apartment houses with some breaks, occasioned to a very limited extent, by the fact that its workmen were at times hindered by the use of the stairways by the defendant's workmen. On January 24, 1889, it drew upon the defendant for $1,500, which draft was returned protested, and then it stopped work on account of this nonpayment. On January 31, the defendant complained by letter of this cessation, which he said was not in accordance with the contract. The plaintiff replied on February 2, claiming compliance, and on February 8, the defendant agreed, in writing, to pay $1,500 on account, "as per contract," immediately after the elevator in the West Flat was running. Work was then resumed, and the elevator in the West Flat was completed on March 6, and the $1,500 were paid, in accordance with the agreement of February 8th.

At this time the work upon the elevator in the East Flat was nearly done. The only remaining work was to place the car in position, and to connect with it the cables, sheaves and fittings. The car and these articles were in the cellar, ready to be put up. Two weeks work would have completed the elevator.

The design for all the cars was sent to the defendant for his approval, by letter of November 28, which has been heretofore quoted. The contract specified that the design was to be submitted for approval. The other plans had been approved.

The defendant did not reply by letter, but in January the general manager of the plaintiff saw him in New York, on the subject; he did not dissent to the design, and cars for apartment-house elevators were thereupon built accordingly. The design or plan for the cars was shown by Mr. Roche to Mr. Godwin, the architect, who disliked it and objected to it on account of its small size. The well-hole or hatchway was a small one, and he wanted as much room as possible in the car. The design was for a "side-post" car, and was as large as the well-hole permitted, but in a "side-post" car there are necessarily inside projections which diminish the inside size or capacity of the car for carrying passengers. When the dimensions are necessarily small, a "corner-post" car furnishes considerable more inside space. The architect objected to this kind of car, but no one declined to accept the design, and no one demanded or required of the plaintiff a corner-post car.

The defendant communicated nothing definite and positive; by his acts assented to the design and permitted the side-post car to be put up in the west flat without objection. When that elevator was completed and he saw the car in running order, he was disappointed at its carying capacity, but he accepted the elevator. On March 7 he told Mr. Ellithorpe that he wanted a corner-post car for the east flat, who replied that he would put one in if he had a written order to that effect. His idea was that he was to have an extra price for the change, inasmuch as a new car would be required. Mr. Sire replied that he would not give a written order; that they were honest people. Ellithorpe had been annoyed and troubled at Sire's refusal to pay more money as the work progressed; distrusted him; refused to change without a written order, and also wanted an additional payment for the work done upon the east flat, which Sire refused to give. As to what subsequently happened—and this is the part of the case in regard to which I am in most doubt—the parties are at a total disagreement. The plaintiff's theory is that Sire prevented its workmen from prosecuting the work and drove them out of the building. The defendant's theory is that the plaintiff voluntarily stopped and abandoned the work because it could get no money, and that prior to its abandonment, viz., on March 7, he told the plaintiff to go on with the work.

It is true that the plaintiff wanted a payment, but it had completed one elevator and could complete another in a short time. That part of the job was almost at an end. On the other hand, Sire wanted a corner-post car in the east flat, and gave orders not to allow a side-post car to be placed, and when the plaintiff's men went there and entered upon the work preliminary to putting up such a car, they were stopped and told not to put it up. They were not prevented from any kind of work; they were prevented from putting up a side-post car. The turning point in this part of the case is the dissatisfaction of Sire with the carrying capacity of the car, his determination to have a corner-post car, and to get it without having bound himself to pay a new price for it.

By the contract the defendant was to have the option, at any time within thirty days, of substituting a screw worm belt elevator in place of the direct steam elevator in the Centre st. building, at a reduced price. He did not make the substitution. About December 9 he made a bargain to sell the building, and he wanted to be released from the Centre st. part of the contract. He had told the plaintiff that he was thinking of selling the building, and if it was sold, asked the cost of cancellation. He was subsequently told that it would be $200. He then told the plaintiff not to ship the machinery for that elevator, and he would either provide another building for it or make a bargain to have the plaintiff take it back. About the same time the defendant also had in contemplation a change in the private house in 59th street from a steam to a hydraulic elevator; enquired of the plaintiff the cost of such a change, and instructed it to retain and not to ship the steam elevator.

The machinery for these elevators was consequently held by the plaintiff in its warehouse, awaiting orders from the defendant, which were never given, although his attention was called to the importance of a decision, by letters of Feb. 2, and March 11. The market value of the finished work of each machine unset was $650 to $700. A fair price for the storage and insurance is $25 per machine. The value of the work done by the plaintiff in the private residence was $60. The value of the elevator in the West Flat, was $2,200. The outlay for and value of the work and labor and set machinery and the unset car and machinery in the East Flat was $2,050.

The defendant afterwards provided another car, and finished the East Flat elevator at his own expense, not using the plaintiff's materials therefor, which are still in the building.

It was not finished on May 1st.

On March 11, the plaintiff wrote the defendant claiming a loss on account of delays and obstructions in consequence of his non-compliance with the contract, the two steam machines had been finished, and were held in store by his instructions, claiming that half the contract price was due by the terms of the contract, asking for its payment, and for a meeting in which they might determine all the questions which were involved. The defendant's brother and attorney replied on March 14, asserting a readiness to fulfil the contract, a desire that the plaintiff should fulfil without delay, that there was nothing to determine upon except for the plaintiff to execute the contract, and denying that he then owed any sum whatever. There was manifestly much to determine in regard to the steam elevators.

Neither party complied with the contract. The plaintiff did not complete the elevators in the apartment house within the specified time. This non-compliance was fully waived by the defendant. The defendant had in fact accepted plans for the cars. He did not decline to accept them when they were submitted, and he permitted the car to be put into the elevator, the work passing almost daily under his observation. He could not, thereafter, require a corner-post car in the East Flat elevator without compensation, and could not compel the plaintiff to stop work unless it provided such new car. The refusal of the defendant to permit the completion of the East Flat elevator by the erection of a side-post car, was a breach of the contract, and there was no wilful abandonment of the work on the part of the plaintiff.

The defendant lost rent upon some of the apartments in the East Flat, because the elevator was not running on the 1st of May, but such loss is attributable to his own conduct, and upon the counter claim no loss or damage is proved for which the plaintiff is liable.

The plaintiff was, at all times, ready and willing to perform its part of the contract, except in the matter of time, which breach was waived by the defendant.

The plaintiff having, in good faith, built and completed the west flat elevator, though not within the time prescribed by the contract, and the defendant having accepted the work, the plaintiff can recover the value of the elevator.

Inasmuch, as after the plaiutiff had fully provided machinery, car and appliances for the east flat elevator, had delivered them all to the defendant upon his premises in pursuance of the contract, where they still remain, had set the machinery and nearly completed the work, and labor upon the elevator, and was without its fault prevented by the defendant from completing the performance of the contract, it is entitled to recover its loss, which consists, in this case, of its outlay, and is the sum of $2,050.

It is also entitled to recover damages from the defendant's virtual refusal to have the contract in regard to the steam elevators carried out; as the machinery is still on hand, and no loss of profits is proved, the damages are merely the proper cost of the storage and the expenses of insurance, viz: $50.

The plaintiff is also entitled to recover $60, the same being the value of the work and material placed upon the private residence.

The sum of $1,900 having been paid by the defendant, the balance, which is due, is $2,485, for which sum, with legal interest from March 14, 1889, as a part of the damages, let judgment be entered for the plaintiff.

Endorsed—Circuit Court of the United States, for the Southern District of New York—Ellithorpe Air Brake Company *vs.* Henry B. Sire—Findings and Decision—Shipman, J.—March 6, 1890—U. S. Circuit Court—Filed March 6, 1890—John A. Shields, Clerk.

FOURTH.—Judgment upon decision and findings entered April 7th, A. D. 1890, in the words and figures following, to wit: (Record page 37).

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ELLITHORPE AIR BRAKE COMPANY

AGAINST

HENRY B. SIRE.

The issues in this action having come on for trial at the October, 1889, term of said Court on the 27th day of January, 1890, the Hon. Nathaniel Shipman, presiding, and the issues having been tried before him without a jury, the same having been waived by stipulation on file in said Court, and judgment having been rendered for the plaintiff as per findings and decision filed herein on the 6th ult., upon which an order was thereafter entered and filed herein, for the sum of two thousand four hundred and eighty-five dollars, with legal interest thereon from March 14, 1889, as part of plaintiff's damages, the same being one hundred and fifty-eight and 60/100 dollars, amounting together to two thousand six hundred and forty-three and 60/100 dollars, and the plaintiff's costs having been duly adjusted at the sum of three hundred and thirty and 05/100 dollars, making in all the sum of two thousand nine hundred and seventy-three and 65/100 dollars, now on motion of Ashton & Fromme, attorneys for said plaintiff, it is hereby

Adjudged that the Ellithorpe Air Brake Company, said plaintiff, recover of Henry B. Sire, said defendant, the sum of two thousand nine hundred and seventy-three and 65/100 dollars, and that said plaintiff have execution therefor.

Dated April 7th, 1890.

Judgment signed this 7th day of April, A. D., 1890.

JOHN A. SHIELDS,
[SEAL.] Clerk.

A copy.
JOHN A. SHIELDS,
Clerk.

FIFTH.—Bill of Exceptions settled, signed and filed April 7th, A. D. 1890, in the words and figures following, to wit: (Record, page 39).

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY B. SIRE, Plaintiff in error, AGAINST ELLITHORPE AIR BRAKE COMPANY, Defendant in error.	**April Term A. D. 1890.**

Defendant's Bill of Exceptions.

The issues in the cause came on to be heard before the Hon. Nathaniel Shipman on the 27th day of Jan. 1890, a jury having been waived by written stipulation of the parties and the trial continued up to and including Feb. 7th, 1890.

APPEARANCES.

ASHTON & FROMME, for the plaintiff.

ALBERT I. SIRE & CHAUNCEY SHAFFER, for the defendant.

The plaintiff to maintain the issues on its part, called as its first witness, Albert C. Ellithorpe, who testified that he was general manager of the plaintiff; about the latter part of September, 1888, submitted to defendant a proposal to erect elevators which was accepted by letter which was admitted in evidence and marked Plaintiff's Exhibit "B."

Plaintiff offered in evidence a paper marked Exhibit "D.,' for identification, which was subsequently found by the Court to be the contract which the parties entered into.

The defendant testified that Exhibit "D" was the contract entered into.

The question was asked by the plaintiff of the plaintiff's manager:

Q. Now, state to the Court, after you received this acceptance, what was done by the plaintiff with reference to fulfilling and performing of this contract?

> This was objected to by defendant. The question was allowed, to which defendant excepted.

After the plaintiff had testified that it put into the apartment flats the two elevators therein, the plaintiff asked of its general manager:

Q. State to the Court what is the cost value of the two machines in the apartment flats?

> This was objected to by defendant as incompetent, irrelevant and immaterial, the contract being an entire contract and speaks for itself on that subject.

THE COURT: I will permit an inquiry of the market value of said two elevators at the time the two elevators were put in the east and west flats.

> Exception by defendant.

Plaintiff asked the question.

Witness testified that he had an interview or talk with Mr. Sire with reference to the proposals, and was then asked:

Q. What was said between you with reference to them? The question had reference to an alleged request to the defendant to sign the proposals.

> Defendant objected to the question as incompetent, irrelevant and immaterial. The question was allowed, to which defendant excepted.

Witness testified that he came to New York as the representative of the plaintiff, and was then asked:

Q. For what purpose?

> This was objected to by the defendant as immaterial. The question was allowed, to which defendant excepted.

The plaintiff's foreman was asked the question,

Q. About what was the value of the work that was done with reference to the elevator in the residence building?

> Defendant objected to the question, as incompetent, irrelevant and immaterial, that the contract being an entire contract is binding upon plaintiff.

The question was allowed, to which defendant excepted.

The same witness was asked,

Q. Do you know the market value of the two hydraulic elevators that were put by the plaintiff into the flat buildings at the time they were put in?

> To this question defendant objected on the ground heretofore stated; that the contract is an entire contract, and the price therein mentioned is the price for all four of the elevators, and also on the ground that there is not sufficient foundation laid to show that this witness is competent to testify as to the price of elevators in New York.

Q. How long have you been engaged in the work in connection with erecting and constructing elevators?

A. For six years.

Q. Are you familiar with the price and cost of that class of elevators?

A. Yes, sir.

MR. SHAFFER: I move to strike out that answer until the objection is passed upon.

Q. Are you familiar with the price of that class and kind of elevators in the City of New York?

A. Yes, within a few dollars.

Q. What was the market value of those?

> Same objection. Question allowed.
> Exception by defendant.

To support this counterclaim as alleged, defendant gave his testimony, and called as witnesses Samuel H. Huxford, William W. Sweet, and Charles A. Stein, and in as much as the matters hereinbefore set forth do not appear of record in this cause, this bill of exceptions is allowed and signed this 7th day of April A. D. 1890.

N. SHIPMAN,
Judge.

SIXTH.—Assignment of Errors, filed October 1st, A. D. 1890, in the words and figures following, to wit: (Record page 43).

SUPREME COURT OF THE UNITED STATES.

HENRY B. SIRE,
Plaintiff in Error,

vs.

THE ELLITHORPE AIR BRAKE COMPANY,
Defendant in Error.

} Assignment of Errors.

Afterwards, to wit, on the Second Monday of October, in the same Term, before the Justices of the said Court at the Capitol in Washington, come the said plaintiff in error by Albert I. Sire, his attorney and say that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

ALBERT I. SIRE,
Attorney for Plaintiff in Error.

SEVENTH.—Citation, issued, served and filed April 7th, A. D. 1890, in the words and figures following, to wit: (Record, page 49).

United States of America, ss.:

To THE ELLITHORPE AIR BRAKE COMPANY,
Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Henry B. Sire is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Dated, N. Y., April 7th, 1890.

N. SHIPMAN,
Judge.

EIGHTH.—Special certificate of the Clerk of the Circuit Court as to paper purporting to be exceptions to the Trial Judge's decision and findings of fact, in the words and figures following, to wit (Record, page 51):

"UNITED STATES OF AMERICA, }
"Southern District of New York, } ss.:

"I, John A. Shields, Clerk of the Circuit Court of the "United States of America, for the Southern District of "New York, in the Second Circuit, do hereby certify that "on the 14th day of March, 1890, the defendant filed a "paper, of which the following is a true copy, in the office

" of the Clerk of this Court, upon which paper no action " was requested of the Court, and none was taken by it. " The defendant claimed that the paper is a part of the proceedings in the within-entitled cause, and should be made " a part of the return to the Supreme Court of the United " States, and at their request it is inserted."

In testimony whereof, I have caused the seal of the said Court to be hereto affixed, at the City of New York, in the Second Circuit, this seventeenth day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of said United States, the one hundred and fourteenth.

(Signed,) JOHN A. SHIELDS,
[L. S.] Clerk.

The paper above referred to, and purporting to be plaintiff in Errors' exceptions to the decision and findings of fact of the Trial Judge, and filed March 14th, A. D. 1890, recites as follows:

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ELLITHORPE AIR BRAKE COMPANY

AGAINST

HENRY B. SIRE.

" The defendant above named excepts to so much of the " findings of fact which were made and filed herein March " 6th, 1890, by his Honor Nathaniel Shipman, Judge, who " tried the above action without a jury, which reads as fol- " lows, viz:"

Then follows numerous *quotations* from the trial Judge's decision and findings of fact, and concludes as follows, to wit:

> "And this defendant further excepts to the con-
> "clusion of said Judge, based upon said findings in
> "which he finds that the plaintiff is entitled to judg-
> "ment for $2,485, and legal interest from March
> "14th, 1890, as a part of the damages, upon the
> "ground that it is not within the issue tried before
> "said Judge."

Dated, New York, March 14th, 1890.
(Signed). ALBERT I. SIRE.
Attorney for Defendant.

To JOHN A. SHIELDS, Esq:,

Clerk of the United States Circuit Court.

As to this paper appearing in the transcript of the record, (See Clerk's Special Certificate page 51 of record).

Brief for Defendant in Error. May it Please the Honorable Court.

Statement.

This is a motion to dismiss the writ of Error with interest, cost and damages, or for the affirmance of the judgment of the Court below with interest, cost. and damages upon the several grounds set forth and specified in the motion papers. (Pages 3-4).

Points.

I.

The only exceptions taken as presented by the bill of exceptions were for an alleged error in the ruling upon the admission of evidence.

Yet the record and bill of exceptions wholly fails to quote or set forth the full substance, or indeed any part of the evidence admitted and objected to. This is absolutely essential, and required by the rules and practice in order to enable the Court to determine whether the ruling complained of was erroneous or not, nor does the assignment of errors set out separately, and particularly specify each error asserted and intended to be urged as required by the rules and practice of the Court. Nor is the assignment of errors signed by an attorney or counsel of this Court. It is presumed that the Court will take judicial notice of who are its officers.

The bill of exceptions wholly fails, and does not pretend to set out all or any part of the evidence heard upon the trial material to the issue. It nowhere appears what evidence was presented upon the trial. *Non-constat*, the evidence in the case fully warranted and justified the trial Judge in his rulings on the objections upon which the exceptions are based. The propriety of the ruling depended entirely upon the state of the evidence. If facts sufficient were not proved to justify the Court below in its ruling, the bill of exceptions should show it. Hence, it clearly appears, so far as the record discloses, that no error was committed by the ruling excepted to. That would undoubtedly be the presumption. The evidence in the case may have made all the facts perfectly clear to the trial Judge, so as to justify his ruling. It is the settled rule that where the facts are clear, it is always a question exclusively for the Court, as bearing upon the question. See Wiggins *et al. v.* Burkham, 10 Wall. 129.

It is questionable if, upon the record, the Court has jurisdiction; that would depend upon the amount in controversy or dispute. The claim of the plaintiff in the Court below was based upon the breach of a written contract for six thousand seven hundred and fifty dollars, upon which had been paid the sum of nineteen hundred dollars, leaving a balance actually due, as claimed, of four thousand eight hundred and fifty dollars, to which the plaintiff in the Court below added a claim by way of special damage, of twenty-five hundred dollars; but upon the trial the Court found that the amount due and owing to the plaintiff below was the sum of two thousand four hundred and eighty-five dollars, thereby fixing the amount actually in controversy between the parties at that sum. (See Complaint, Court's Findings and Judgment.) True, the plaintiff in error set up a counterclaim for damages to the extent of six thousand dollars, but the record wholly fails to disclose any evidence whatever sustaining the same, and so the trial Judge found, so that so far as it appears by the record, the *actual* amount in controversey was two thousand four hundred and eighty-five dollars, with interest thereon, as specified in the Court's findings. The plaintiff in error's answer was a mere assertion; no evidence is presented by the record to sustain it, and so held by the trial Judge. As we understand the rule: "The burden of showing jurisdiction is on the plaintiff in error; he must establish as a fact, by a fair preponderence of testimony, that the value of the property (amount) in dispute exceeds five thousand dollars." This he has wholly failed to do, so far as the record discloses.

Wilson *v.* Blair, 119 U. S., 387.

But if the record shows upon its face jurisdiction, then we insist that it is clearly frivolous, and would entitle the defendant in error to a dismissal of the writ of error or affirmance of the judgment for want of jurisdiction.

Rule 6, Part 5.
Micas *v.* Williams, 104 U. S., 556.
Chanute City *v.* Trader, 132 U. S., 210.

The ruling excepted to was wholly immaterial to the merits as presented at the trial, and therefore not assignable as error. However it may have been ruled in the Court below, no injury or disadvantage could have occurred to the plaintiff in error. It is said by this Court that "there must be some injury to the party to make the matter generally assignable as error."

> Greenleafs Lessee *v.* Birth, 5 Peters, opinion, page 134.

Every one of the exceptions presented by the bill of exceptions are wholly untenable, no answers to any single one of the questions asked and objected to at the trial, and made the basis of an exception by the plaintiff in error, is set forth in the bill of exceptions, nor do they anywhere appear in the record, with the single exception of "*for six years.*" "*Yes, sir.*" "*Yes, within a few dollars.*" Here you have every particle of the evidence as set forth in the bill of exceptions, or as shown by any other part of the record. Notwithstanding there were over twenty-four witnesses who testified upon the trial, and the oral testimony consisted of nine hundred and thirty-five pages of type-written matter, making over twenty-two hundred folios, and at least twenty written and printed exhibits, exclusive of five copies of plans and drawings, making in all over twenty-five exhibits, all of which were presented and put in evidence by the respective parties upon the trial, and were material to the issue.

> See Bill of Exceptions and affidavit attached to motion papers.

No part of the evidence given at the trial except as above set forth, is set out in the bill of exceptions and made a part of the record. This is *absolutely essential*, at least so much of it as is material to the issue, unless the answers to questions are set forth and made a part of the bill of exceptions, "*there is no error of which a revising Court can take notice.*" We know of no exception to the rule, whether the questions are upon the direct or cross examination. So far as the bill of exceptions in the case at bar discloses it is only matter of conjecture whether any answers were given to any of the questions objected to, except as above set forth.

Nailor *v.* Williams, 8 Wall., 107.

The exceptions as well as the defense, so far as presented by the record, are entirely without merit. It is self-evident that the writ of error is prosecuted for delay only, and should be dismissed, or judgment affirmed with interest, cost, necessary disbursements and ten per cent. damages.

Campbell *v.* Wilcox, 10 Wall, (opinion) 423.

It is essential that the exhibits used and put in evidence at the trial should be set forth in the record, no single one of the twenty-five exhibits put in evidence upon the trial is contained in the bill of exceptions or otherwise shown by the record.

Rule 8. Part 3.

II.

Jury having been waived and cause tried by the Court as per agreement in writing, no questions of fact or law decided by the Court below can be reexamined or reviewed in Supreme Court, this was the rule prior to the recent Statute, Campbell *et al. v.* Boyreau, 21 How., 223, and cases cited; true, the statute has somewhat changed the old rule. But in order to enable plaintiff in error to come within the statute, it is necessary that the evidence or the material part thereof should be set out in the bill of exceptions, and this is so because, in that way only will the reviewing court be able to determine whether there is any error of Law in the Judgment rendered in the court below upon the facts found as bearing on the point.

See Andes *vs.* Slauson, 130 U. S., (opinion) 438.
Paine *vs.* Central Vt. R. Co., 118, U., S. 152,
Boogher *vs.* Insurance Company, 103. Id., 90.

Error in the admission or exclusion of evidence must be presented in the Court below upon motion for new trial, in order to review upon error or appeal—at least we think this would be the proper practice at Common Law.

> Delhaney *v.* State, 115, Ind., 499, and citations. Frybarger *v.* Andre, 106 Id., 337. Marshall, *et al*, *v.* Lewark, 117. Id., 377.

Findings of Circuit Court without a jury. Conclusive upon Supreme Court.

> Stanley *v.* Albany, 121, U. S. (opinion) 547.

III.

As disclosed by the record, if anything is presented for the Court to pass upon at all it is simply and purely a question of fact. It would be a work of supererogation to cite authorities upon the rule that a review by the Supreme Court upon error is limited to questions of Law.

> Andes *v.* Slauson, 130, U. S. 435.
> Dean *v.* Mason *et al*, 20 How. 198.

At this term of the Court on the 3rd of November, an opinion was delivered repeating the rule, and also holding what is necessary to be presented by the assignment of errors. No error of law is alleged or pointed out by the assignment of errors attached to the record. The assignment of errors should specify the errors relied upon, each error asserted and intended to be urged should be set out separately and particularly.

It is the settled rule and practice of the Court that where the error alleged is to the admission or rejection of evidence, the specification must quote the full substance of the evidence admitted or rejected. In the case under consideration the only pretended or alleged error relied upon as a basis of exception as appears by the so called bill of exceptions, is the overruling by the trial Judge of plaintiff in error's objection to the allowing of certain questions, yet it wholly fails to set out or specify the evidence objected to, simply setting out the *questions*.

As before stated, while there were at least twenty-five Exhibits used and put in evidence upon the trial, not a single one is presented in the record or bill of exceptions clearly indicating that the writ of error was sued out simply for delay. It is absolutely necessary that the Exhibits should be set out in the record.

R. S. § 997—Rule 21, Part 4.

There remains but one other point to submit for the consideration of the Court, and that is the most *unique* one of the series, to wit, the extraordinary document *dehors* the record, sent up as a part of the transcript upon the persistent demand of counsel for plaintiff in error, under protest of the clerk and counsel for defendant in error, denominated, "*Defendants exceptions to findings of fact and conclusion of said Judge, based upon said findings*," signed, "Albert I. Sire, attorney for defendant," which document was very felicitously called by the learned trial Judge, the "*annex*"; whether the result of stupidity, or an intentional imposition upon this Court we are not advised.

If any evidence is required to satisfy the Court that this writ of error is not prosecuted in good faith, but simply, purely and solely for delay, that ought to be conclusive. The bringing of this record here, unnecessarily imposes upon the defendant in error large expense for printing and otherwise, at the same time imposing upon the Court, especially in the over-burdened condition of its calendar; justifying us in repeating what this Court has said upon the subject, speaking through the late Chief Justice Waite, in Whitney *v.* Cook, 99 U. S., 607, and reiterated by Mr. Justice Blatchford, in 132 U. S., before cited: "Our

" experience teaches that the only way to discourage friv-
" olous appeals and writs of error is by the use of our
" power to award damages, and * * * * hereafter more
" attention will be given to that subject, and the rule en-
" forced, both according to its letter and spirit. Parties
" should not be subject to the delay of proceedings for re-
" view in this Court without reasonable cause, and our
" power to make compensation to some extent for the loss
" occasioned by an unwarranted delay ought not to be over-
" looked."

Therefore, we respectfully submit that the motion ought to be granted with interest, cost, ten per cent. damages, and such necessary and imposed disbursements as the Court has power to award.

Respectfully submitted,

SAM'L ASHTON,
Counsel for Deft. in Error,
132 Nassau Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1479.

HENRY B. SIRE,
Plaintiff in Error,

vs.

THE ELLITHORPE AIR BRAKE
COMPANY.

In Error to the Circuit Court of the United States for the Southern District of New York.

Petition for Rehearing.

And now comes Henry B. Sire, plaintiff in error, and prays for a rehearing of the said cause, and for grounds of such rehearing, he says:

First.—The learned Court has said, in its opinion, that it thinks there was sufficient color for the motion to dismiss, to warrant it in considering the motion to affirm.

The plaintiff in error understands from the opinion of the Court that certain deficiencies in the bill of exceptions in the record, were deemed by the learned Court as proper ground for the motion to dismiss the writ of error; but he respectfully submits, with great deference, that such deficiencies, or informalities, in the bill of exceptions, do not constitute a ground upon which the Court can be asked to dismiss the writ of error.

Chief Justice Taney, delivering the opinion of the Court, in Hecker *vs.* Fowler (1 Black, 95), said:

"*Want of jurisdiction and irregularity of the writ, are the only grounds for dismissal.* Where a judgment appears to have been rendered, which the party is entitled to have revised in this Court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing. To say that there is no error in this judgment, and affirm it, for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ."

In the case of *The Rio Grande* (19 Wall., 178), it was held that a motion to dismiss upon an allegation of deficiencies in the record will be denied.

The plaintiff in error would thus respectfully submit that the amount in dispute between the parties was the only matter for consideration by the Court upon the motion to dismiss the writ of error here, and that with respect to that matter, there was no *color* for the motion under the settled law of this Honorable Court.

The amount of the counterclaim, in the record, upon which the plaintiff in error was defeated wholly in the Court below, is, clearly and indisputably, sufficient to give this Court jurisdiction of the case.

The learned Court will observe that the motion to dismiss does not even expressly allege and specify as a ground for the motion, that the amount involved in the case is not sufficient to give this Court jurisdiction.

(Motion, Record and Brief of Defendant in Error, pages 3-5).

It is also a fact that the defendant in error was fully advised by the decision of Judge Brown, in March, 1890, denying its motion to vacate the order of that learned Judge, staying proceedings by the defendant in error, that the plaintiff in error had the plain right to have the judgment in this case reviewed by the Supreme Court.

(The decision of Judge Brown is referred to in the *Brief of Plaintiff in Error*, page 2.)

Second.—With regard to the bill of exceptions, the learned Court has said, in its opinion, that it cannot be seen that the questions propounded to the witness for the plaintiff (defendant in error) were improper, or that the answers to them caused any injury or disadvantage to the defendant.

The plaintiff in error would respectfully submit, however, in this connection, that the bill of exceptions shows that the plaintiff below was expressly permitted by the trial Judge to introduce testimony to show the *market value* of the *two elevators put into the apartment flats*, against the objection of the defendant to the admissibility of such testimony upon the ground that *the contract sued on was an entire contract, and the price therein mentioned is the price of all four of the elevators.*

The record shows plainly that the judgment was based upon this testimony, which the plaintiff in error respectfully contends and submits was inadmissible and incompetent under the pleadings in this case.

The complaint, as will be seen, declares upon an *entire contract*, for four elevators, and it is not alleged or pretended in the complaint that the contract was *abandoned* or *rescinded*, and there is nothing, corresponding to the *common counts*, in the complaint, under which there could legally be a recovery, in this case, of the market value of the *two elevators* in the apartment flats, *or either of them.*

The bill of exceptions states as follows:

After the plaintiff had testified that it put into the apartment flats the two elevators therein, the plaintiff asked of its general manager:

Q. State to the Court what is the *cost value of the two machines in the apartment flats?*

> This was objected to by defendant as incompetent, irrelevant and immaterial, *the contract being an entire contract and speaks for itself on that subject.*

The Court: *I will permit an inquiry of the market value of said two elevators at the time the two elevators were put in the east and west flats.*

> Exception by defendant.

Plaintiff asked the question:

* * * * * * * *

The plaintiff's foreman was asked the question:

Q. About what was the value of the work that was done with reference to the elevator in the residence building?

> Defendant objected to the question, as incompetent, irrelevant and immaterial, *that the contract being an entire contract is binding upon plaintiff.*

The question was allowed, to which defendant excepted.

The same witness was asked:

Q. *Do you know the market value of the two hy-*

draulic elevators that were put by the plaintiff into the flat buildings at the time they were put in?

> To this question defendant objected on the ground heretofore stated; *that the contract is an entire contract, and the price therein mentioned is the price for all four of the elevators, and also on the ground that there is not sufficient foundation laid to show that this witness is competent to testify as to the price of elevators in New York.*

Q. How long have you been engaged in the work in connection with erecting and constructing elevators?

A. For six years.

Q. Are you familiar with price and cost of that class of elevators?

A. Yes, sir.

Mr. Shaffer: I move to strike out that answer until the objection is passed upon.

Q. Are you familiar with the price of that class and kind of elevators in the City of New York?

A. Yes, within a few dollars.

Q. *What was the market value of those?*

> *Same objection. Question allowed.*
> *Exception by defendant.*

The plaintiff in error respectfully submits that the correctness of the ruling of the Court below, that it was competent for the defendant in error, under the pleadings in this case, to prove the market value of two of the elevators, embraced by the entire contract sued on, independently of the terms of that contract, is fairly and properly presented by the bill of exceptions in this record.

He submits that this is an important question upon which it is proper he should be heard before judgment is finally pronounced against him.

This learned Court decided in *Scotland County* v. *Hill* (112 U. S., 184), that a mere *offer* of proof made and rejected, which was legally competent, was the sufficient basis for a bill of exceptions, *although the record did not show that any witness was actually called to give the evidence, or that any one was present who could be called for that purpose.*

It was stated that after a bill of exceptions had been allowed, in such a case, "*the appellate Court must assume that the proof could have been made, and govern itself accordingly.*"

In the present case, it is shown, by the bill of exceptions, that the alleged incompetent testimony was allowed to be introduced, and it is disclosed by the record that this testimony was the basis of the judgment against the plaintiff in error.

It is respectfully, and with great deference, submitted therefore by the plaintiff in error, that the judgment below ought not to be affirmed by this learned Court at this time.

Third.—The learned Court has said that the facts as found below, in its opinion, clearly justified the conclusion of law drawn by the Court.

The plaintiff in error would desire to be heard upon the question as to the right of the Court below to render a judgment in respect to the two elevators, upon the pleadings in this case, and the issues raised by these pleadings between the parties.

He submits that the opinion of the Court below shows the issues raised by the pleadings, in the case, were not really tried at all by the learned Judge who rendered the present judgment.

Fourth.—The plaintiff in error respectfully shows to the Court that it appears by the bill of exceptions, in the transcript in the Clerk's office, that the papers described therein and marked as "*Plaintiff's Exhibit B*," and the paper described therein and marked "*Exhibit D*," are omitted from the bill of exceptions, though it was intended that they should be incorporated therein, as appears by the direction, on the face of the bill of exceptions in the written transcript in the Clerk's office, to "*take in*" the said exhibits respectively.

The said bill of exceptions states that the said *Exhibit D* was found by the Court to be the contract which the parties entered into.

The "findings and decision" of the Court refer also to the contract, marked "*Exhibit C*," which should have been but is not annexed to that document, which finds that "Exhibit D" was the contract made by the parties, as stated in the bill of exceptions.

The plaintiff in error respectfully submits that as this is the first term of the entry of the cause, he should be granted time, in accordance with the rule and practice of this Court, as he is advised, to bring up the said exhibits and perfect the record, by *certiorari* or otherwise, if it can be done.

He expects to be able to show this honorable Court, by the exhibits referred to, when brought up, that the contract upon which the learned trial Judge rendered his judgment, is not the contract upon which the complaint in this cause was founded, and upon which alone the plaintiff below was entitled to recover in this action.

HENRY B. SIRE,
By ALBERT I. SIRE,
His Attorney and Counsel.

I, Albert I. Sire, attorney and of counsel for Henry B. Sire, in the case in which the above petition for a rehearing is filed, do hereby certify that I have examined the said petition and the opinion of the Court and the record in the case of Henry B. Sire, Plaintiff in Error *vs.* The Ellithorpe Air Brake Company (No. 1479), and that I am of opinion that the points and grounds taken in the said petition for rehearing are well taken, and that there is good reason for the filing of such petition, and that the same is not filed for any purpose of delay.

ALBERT I. SIRE.